IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,

Appellant,

vs.

MAX FACTOR & CO., A CORPORATION, AND SALES BUILDERS, INC., A CORPORATION,

Appellees.

BRIEF FILED ON BEHALF OF THE OHIO STATE PHARMACEUTICAL ASSOCIATION, AMICUS CURIÆ.

Although we are convinced that the Legislature of Ohio had full power to enact the Fair Trade Statute, and that the same is a valid enactment, it is not intended in this brief memoranda to discuss the constitutionality

of such statutes, but merely to acquaint the court with the conditions as they exist in Ohio relative to such legislation and to point out the reasons for its enactment and the results of its operation.

Ohio has about twenty-five manufacturers, fifteen wholesalers or jobbers, and thirty-eight hundred retailers dealing in drug articles of standard quality bearing a trade-mark, brand or name.

In addition, there are great numbers of manufacturers and dealers in such articles located outside of Ohio, but doing business with respect thereto in Ohio. The state is thickly populated, having a number of cities ranging from forty thousand to one million in population and innumerable towns, villages and cities of smaller population. Articles of standard quality bearing a trade-mark, brand or name, the value and good will of which have been established by large expenditures on the part of manufacturers and jobbers, are sold by all druggists in the state and, as well, by numerous department stores. There are many chain drug stores in the state with branches in all important centers and in many of the smaller towns. Throughout the state are approximately twenty-six hundred independent drug stores, located in neighborhoods where they are convenient to patrons and, in fact, where they are necessary for the health and welfare of the people of such communities. These independent stores, as a rule, while doing a small volume of business compared with the larger stores, are still able to make a reasonable profit for their owners, if they are not destroyed by cut price competition.

During the last few years, the smaller independent stores of the state have been greatly crippled by reason of competition of the chain stores and the larger independent drug stores, principally by means of competition of articles known as "loss leaders," on which prices have been cut, with the result that many of such independent stores have been unable to make a profit and, in many instances, have been entirely driven out of business. This has brought financial disaster to their owners and great inconvenience and positive injury to the neighborhoods where people have been accustomed to depend upon such stores for drugs and medicines which they need.

By the practice of price cutting on standard articles, customers, particularly those of independently operated stores, are decoyed into stores of the price cutters, with the purpose on the part of the price cutters of persuading and inducing such people not to buy the so-called "loss leaders," which frequently they are "just out of," but other articles, the prices of which may be regulated so as to take up the loss on the particular standard articles offered and sold reluctantly, if at all, at the cut prices.

This conduct has adversely affected the manufacturer and producer whose actual market is, after all, the ultimate consumers. A normal course of business could not be maintained because producers could not be assured of even and continuous distribution of their goods. The public lost confidence in excellent goods when the low prices were published and observed. Hence, the reputa-

tion and good will of the manufacturers in such products have been injured, if not destroyed.

The jobber or wholesaler has been likewise affected.

The retailer has been unable or unwilling to provide and maintain a necessary stock in well-known standard brand products because any day, in his locality, one of the cut price merchants, if only for a week or two at a time, might reduce the price on such standard brands, so that those on the shelves of the man desiring to trade fairly could not be sold. In addition, his customers, attracted by the price cut merchandise, have purchased other goods at the stores to which they have been induced to go by low prices on certain brands. Furthermore, customers have been led to buy inferior goods, believing them to be bargains.

Radio and newspaper advertising of cut prices, and good roads, have induced people living in smaller towns to visit the larger places for shopping. Furthermore, chain stores have been entering the smaller towns and even neighborhoods in cities and towns having independent neighborhood drug stores.

These conditions have taken away all incentive for younger men to become pharmacists and to open their own stores, when they know that by the method of price cutting they will not be able to remain in business.

Proprietors of independent stores have been required to work long hours because of inability to employ help and because they are required by the law to have a registered pharmacist in attendance at all times.

As a result of these conditions, many storerooms throughout the state are vacant, which would otherwise have been occupied, and tax duplicates have been lowered.

Manufacturers have tried to stop price cutting by appealing to retailers, but without avail. Prices cannot be controlled by contract or exclusive privilege because of the necessity of mass selling to numerous dealers.

Briefly, this was the situation in Ohio when the Legislature, after receiving a special message on the subject from the governor (see Appendix), who recognized the necessity of correcting the evils above mentioned, enacted what is known as House Bill No. 609, the same being an Act "To protect trade-mark owners, distributors and the general public against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name."

A true copy of this Act appears in the Appendix.

This law became effective July 9, 1936. Immediately, through the offices of The Ohio State Pharmaceutical Association, all retail druggists, chain stores and department stores handling the articles described in the Act were given notice of the provisions of the law and were urged to observe it.

Although it has been in operation but a few months, the beneficent effects of the law are already apparent. Independent retailers know and understand that their business cannot be destroyed by wicked and cutthroat competition, which is not only unfair to them, but which may be generally characterized as a fraud on the consuming public. But a few attempts to violate the law have appeared. Many of these were the result of ignorance as to the requirements of the statute and when the at-

tention of violators has been called to the law, the price cutting, almost without exception, has been stopped. It is believed that as a result of this Act, many independent dealers who have been put out of business by predatory price cutting, will again engage in industry, knowing that they will not be attacked by groups who have succeeded in dominating an industry and in destroying legitimate trade by cutting prices on standard articles.

It was the opinion of the Legislature that the Ohio Fair Trade Law is definitely in the interest of the producer, distributor and the consumer alike; that price cutting practiced under the "loss leader" theory not only destroyed competition, but tended to restrain trade, create monopolies in the business of those who practiced it, brought about lower wages, longer hours, coercion of independent manufacturers, wholesalers and retailers and, finally, higher prices to consumers on other articles that people must buy, whereby the losses on the standard brands were made up.

It was to remedy these evils that the Ohio Fair Trade Law was enacted. The people of the state of Ohio are interested in having it preserved. The short experience during the operation of the law has already shown great benefits to the people of the state. It is for these reasons that it has been deemed advisable to bring the Ohio legislation to the attention of the court.

Respectfully submitted,

FRED C. RECTOR,
Columbus, Ohio,
Attorney for The Ohio State Pharmaceutical Association.

WILSON & RECTOR,
Columbus, Ohio,
Of Counsel.

APPENDIX.

(House Bill No. 609.)

An Act

To protect trade-mark owners, distributors and the general public against injurious and uneconomical practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. The purpose of this act is to promote the public welfare by protecting the general public, trade-mark owners and distributors against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

SECTION 2. No contract relating to the sale or resale of a commodity which bears, or the label or container or content of which bears, the trade-mark, brand, or name of the producer or of the owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of Ohio by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(b) That the vendee or producer require any person to whom he may resell such commodity to agree that he

will not, in turn, resell such commodity at less than the minimum price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply provisions that such commodity may be resold, without reference to such agreement, in the following cases:

(a) When closing out the owner's stock for the purpose of discontinuing delivery of any such commodity, provided, however, that such stock is first offered to the manufacturer of such stock, or his duly authorized agent, at the prevailing invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(b) When the commodity is damaged or deteriorated in quality and proper notice thereof is given to the public.

(c) When the commodity is sold by the order of any court of record.

SECTION 3. Whoever knowingly and wilfully advertises, offers for sale or sells any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provisions of Section 2 of this act, whether said person so advertising, offering for sale or selling such commodity is or is not a party to such contract shall be deemed guilty of engaging in unfair competition and unfair trade practices and is actionable at the suit of any person damaged thereby.

SECTION 4. Any person violating the provisions of this act shall be liable at the suit of any other retailer of such commodity or at the suit of any other person or per-

sons injured thereby, including the producer of such commodity, which suit may be for an injunction against such practice.

SECTION 5. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 6. As used in this act unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce bearing a trade-mark, brand or name.

"Trade-mark", "brand" or "name" means any form, symbol or name appropriated by any person, as herein defined, who produces or owns or in any manner deals in a commodity, to designate the origin of ownership thereof.

"Person" includes individuals, partnerships, corporations, and any other business unit and/or receiver, trustee or assignee of such business units.

SECTION 7. If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this act shall apply or be construed to apply to foreign or interstate commerce,

except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

SECTION 8. As of the effective date of this act, Sections 6390 to 6402-1, inclusive, of the General Code, shall not apply to contracts entered into, or proceedings instituted, pursuant to the provisions of this act.

J. Freer Bittinger,
Speaker of the House of Representatives.
Paul P. Yoder,
President pro tem. of the Senate.

Passed March 26, 1936.
Approved April 7, 1936.
Martin L. Davey,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ninth day of April, A. D. 1936.

I hereby certify that the foregoing is a true copy of the engrossed bill.

George S. Myers,
Secretary of State.

Governor's Office: December 10, 1935.

To the Members of the Ninety-first General Assembly in Special Session:

Under date of September 12, 1935, a proclamation was issued by me, calling a special session of the 91st General Assembly of the State of Ohio for 1:30 p. m., on Wednesday, September 18, 1935, for the purpose of considering certain legislation as set forth in said proclamation. I

am by this message authorizing the General Assembly to consider matters other than those named in the proclamation.

It has been brought to my attention by manufacturers, wholesalers and retailers of many articles of merchandise bearing a trade-mark, brand or name, that certain injurious, uneconomic practices in the distribution of such articles, have threatened destruction of the value of such trade-mark, brand or name.

It has further come to my attention that various interested persons engaged in the production, distribution and sale of such trade-marked articles have spent a great deal of time and effort in the preparation of legislation to remedy this condition. Legislation has been prepared which would authorize a manufacturer or producer of a commodity which bears his trade-mark, brand or name, and which is sold in fair and open competition with the commodities of the same general class produced by others, to make a contract with a retailer not to sell such commodity except at the price stipulated by the manufacturer or producer. The proposed legislation is in no way a general price-fixing act. Under no condition, does it authorize a contract or agreement between manufacturers and producers or between wholesalers or between retailers as to the sale or resale prices of any commodity. The suggested legislation is merely permissive, and would authorize a manufacturer or producer to enter into contracts for the maintenance of his prices, but it does not compel him to do so.

It seems to me to be sound economy to devise a method whereby a manufacturer or producer may protect himself against undue slashing of the price of his product, and consequent destruction of the value of his trade-mark and good will, and with unnecessary loss to others.

I believe that this proposed legislation will protect the small independent merchant and retailer in business. It should offer some protection against devastating cut-price practices, such as the ruthless method of loss leader articles. It will also serve to discourage falsification and adulteration of commodities. Similar legislation has already been enacted in the States of New York, New Jersey, California, Wisconsin, Illinois, Iowa, Washington, Oregon, Maryland, and is now under consideration in the states of Colorado, Indiana, Massachusetts, Missouri, Oklahoma, Tennessee, Texas and West Virginia.

After considerable study and consideration of the proposed legislation, I believe it to be in the general public interest, and that it should be placed on our statute books.

I therefore suggest to the 91st General Assembly in special session that legislation be enacted that will protect trade-mark owners, distributors, and the general public against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand or name.

Martin L. Davey,
Governor.